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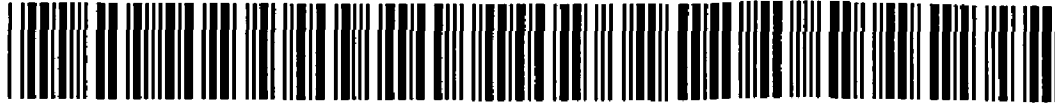
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APPELLEE'S BRIEF

J.W. La 10 10 46 40

SUPREME COURT OF KENTUCKY

File No. 76-330

PAT G. KRUGER, - - - - - Appellant,

versus

JOSEPH M. SHELLMAN and
INDEPENDENCE LIFE AND ACCIDENT IN-
SURANCE COMPANY, - - - Appellees.

Appeal from Graves Circuit Court
(Second Appeal)

BRIEF FOR APPELLEE, JOSEPH M. SHELLMAN
FILED

AUG 20 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

MALCOLM R. BOAZ

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*Attorney for Appellee, Joseph
M. Shellman*

I certify that I have served this brief on each party to this action by mailing copies to each party's attorney, namely to Hon. Dennis L. Null and to Hon. Farland Robbins, and to Honorable W. C. Tipton, the Trial Judge, pursuant to RAP 1.250, this August 19, 1976.

Malcolm R. Boaz

*Attorney for Appellee, Joseph
M. Shellman*

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QUESTIONS PRESENTED

1. Was the decision of the Court of Appeals on the former appeal "That since the policy gave him (Shellman) the exclusive right to change the beneficiary, no attempt by Maydee to effect such a change could have been effective" the law of the case and binding on the second appeal?

2. Did the Trial Court err by entering a Summary Judgment for Shellman after the Court of Appeals decision and the issuance of the Mandate?

SUPREME COURT OF KENTUCKY

File No. 76-330

PAT G. KRUGER, - - - - - *Appellant,*

v.

JOSEPH M. SHELLMAN and
INDEPENDENCE LIFE AND ACCIDENT INSURANCE
COMPANY, - - - - - *Appellees.*

BRIEF FOR APPELLEE, JOSEPH M. SHELLMAN

COUNTER-STATEMENT OF THE CASE

This is an action originally filed by the Independence Life and Accident Insurance Company to determine the proper recipient of a life insurance policy on the life of Maydee Kennedy Shellman, now deceased. Joseph M. Shellman, Maydee's former husband, Jewell E. Lamb and Pat G. Kruger were named as defendants to the action because of their claims to the proceeds. At the time the policy was issued, Maydee Kennedy Shellman and Joseph M. Shellman were man and wife and operated as partners a nursing home three miles East of Mayfield on the Murray Road. Thereafter, the Shellmans were divorced and shortly thereafter it was claimed Maydee married the appellee Jewell E. Lamb. Pat G. Kruger, the appellant herein, was at all

times mentioned an agent of the Independence Life and Accident Insurance Company. She sold and witnessed the signatures to the policy in question. After Maydee's death, Kruger forwarded to the Independence Life and Accident Insurance Company a Change of Beneficiary form on the subject policy naming herself and Lamb as beneficiaries and allegedly signed by Maydee Kennedy Shellman.

Chronological Statement of Essential Facts.

The appellee, Joseph M. Shellman, by reference adopts as a part hereof the Statement of the Case and the detailed statement of the proceedings and facts contained in his "Brief For Appellant Joseph M. Shellman" submitted on the first appeal, page 2 through 10.

The matter was decided below originally on written Motion for Summary Judgment filed by Joseph M. Shellman (RA 49 first appeal) and by Pat G. Kruger RA 63 first appeal). At the hearing on that date the former appellee Lamb made an oral Motion for Judgment and the decision was awarded to Kruger and Lamb and against Shellman on September 27, 1973 (RA 64 first appeal).

On appeal the decision of the Graves Circuit Court in deciding the case in favor of Pat G. Kruger and Jewell E. Lamb was reversed. (See Shellman v. Independence Life and Accident Insurance Company, et al., Ky., 523 S. W. 2d 221.) Thereafter, Mrs. Kruger and only Mrs. Kruger petitioned the court for a Rehearing which was denied and the mandate issued in due course.

Thereafter, on July 18, 1975, the Trial Judge, pursuant to the opinion of the Court of Appeals and its mandate, signed and entered an order sustaining a motion for Summary Judgment in behalf of Joseph M. Shellman (Tr., pp. 2 & 3).

The appellant Kruger thereafter objected to the entry of the Judgment and moved that it be set aside (Tr., pp. 5 & 6), and the Trial Court, after a hearing on January 3, 1976 with counsel for both Kruger and Shellman present, overruled Kruger's objections and motions and entered another order styled "Judgment on Remand" sustaining its motion for Summary Judgment in behalf of Shellman and directing that the money be paid to the appellee Joseph M. Shellman. From this Order the appellant Kruger has appealed.

ARGUMENT

- (1) **Was the Decision of the Court of Appeals on the Former Appeal "That Since the Policy Gave Him (Shellman) the Exclusive Right to Change the Beneficiary, no Attempt by Maydee to Effect Such a Change Could Have Been Effective" the Law of the Case and Binding on the Second Appeal?**

This is the third time this case is before the Court of Appeals and Supreme Court. The first time on an appeal by the now Appellee, Shellman, a second time on a motion for rehearing by the now Appellant, Kruger, and, now, a third time on this second appeal by Kruger. All the other parties have long since gone by the wayside, admitting the validity of the claim of

Shellman to the proceeds of the insurance policy in question.

Only Kruger, the agent who sold the policy in question, in whose apartment the alleged change of beneficiary form was allegedly signed, who kept the document in her possession until a month after the insured died, and one of the two persons to benefit from the change, continues to object.

Kruger, in her Brief, buckshots the Court with learned discussions on a multitude of points of law none of which deal with the Court's decision on the first appeal, i.e., Shellman is the owner of the policy in question and no one could change the beneficiary without his permission. *Shellman v. Independence Life & Accident Ins. Co., Ky.*, 523 S. W. 2d 221. Kruger's brief on this second appeal is mindful of the Court's words in *Morguelan v. Lynch, Ky.*, 244 S. W. 2d 433, "a large part of her (widow's) brief is taken up with a full and learned discussion on the subject of jointure. Unfortunately for her, this Court decided on the first appeal that under Item 6 of the will the \$4,000 bequest was a general legacy and not a specific bequest in lieu of dower. Our construction of this item of the will in the first opinion is now the law of the case and binding upon this appeal".

This Court on the original appeal of this case had the policy of insurance before it. There was not then nor now questions concerning what it stated. The Court ruled that the insured could not change the beneficiary if she wished. There is no material issue of fact concerning the terms of the policy and the Court's opinion

on the first appeal is the law of the case and binding on this second appeal. *Copely v. Craft*, Ky., 341 S. W. 2d 70, *Aetna Freight lines Ins. v. R. C. Tway Co.*, Ky., 352 S. W. 2d 372, *Inter-Southern Life Ins. Co. v. Hughes Committee*, Ky., 17 S. W. 2d 743.

The factual situation of this appeal is the reverse of the situation found in *Ainsworth v. Ainsworth*, Ky., 321 S. W. 2d 33. In that case the Court determined the provisions of an agreement to be ambiguous and reversed with directions to take more proof. On the second appeal the Court ruled "The argument (on second appeal) that the contract is not ambiguous is precluded by our opinion on the first appeal, which is the law of the case." Here, on the first appeal the Court held that the Contract of Insurance was not ambiguous, that the Appellee Shellman was the owner of the Contract and his ex-wife could not change the beneficiary. That must be the law of the case on this appeal and binding on the Appellant, Kruger.

(2) Did the Trial Court Err by Entering a Summary Judgment For Shellman After the Decision of the Court of Appeals and the Issuance of the Mandate?

The opinion of the Court of Appeals on the first appeal is straight forward. There is no ambiguity. Justice Palmore speaking for the whole Court said "And since the policy gave him the exclusive right to change the beneficiary, no attempt by Maydee to effect such a change could have been effective. We are of the opinion that the Summary Judgment should have been in favor of Joseph Shellman rather than against

him. The Judgment is reversed with directions for further proceedings consistent herewith." Did this mean that the Trial Court should take further proof in the case on remand? Justice Lukowsky's concurring opinion defeats that argument.

The Appellant has presented no argument that would justify reversal of the Summary Judgment entered by the Trial Court after the issuance of the Mandate. This Court should not permit the Appellant Kruger to reopen this case by means of a second appeal from a Judgment entered in conformity with the decision and mandate of the Court of Appeals. If this practice were permitted, no litigation could ever be terminated. *Taylor, et al. v. Mills, Ky.*, 320 S. W. 2d 111, *Hutchins v. Louisville Trust Co., Ky.*, 276 S. W. 2d 461.

CONCLUSION

The Trial Judge in this case did no more, nor any less, than what the Decision and Mandate of the Court of Appeals required him to do. He entered a Summary Judgment in behalf of Joseph Shellman.

The Appellant's appeal should be dismissed.

Respectfully submitted,

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